IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 585.

The Louisville & Nashville R. R. Co. et al., Appellants,

vs.

Henry W. Behlmer, . . . Appellee.

MOTION TO VACATE SUPERSEDEAS.

Brief of Appellants Against Motion.

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I.

STATEMENT OF FACTS.

A petition was filed before the Interstate Commerce Commission by the appellee, H. W. Behlmer; and such proceedings thereunder were had that on the 27th day of June, 1894, the Interstate Commerce Commission entered an order requiring the appellants to cease and desist on or before the 15th day of July, 1894, and thenceforth to abstain from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those appearing in this case, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneous-

ly charged and received for the transportation of hay and such other commodities for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina.

The defendants to said proceeding before the Interstate Commerce Commission having failed to comply with such order, the said Henry W. Behlmer filed his petition, as he was authorized to do by the Interstate Commerce Law, in the Circuit Court of the United States for the District of South Carolina, in which the action before the Commission was set out, and the failure of the defendants therein to comply with said order; and prayer was made that an order be entered granting to the petitioner a writ of injunction, restraining the defendants, their officers, servants, and attorneys from continuing in their violation and disobedience to said order of the Interstate Commerce Commission, etc.

The case in said Circuit Court of the United States for the District of South Carolina was duly matured, and came on to be finally heard on the 11th day of December, 1895, when, after argument, the said Circuit Court of the United States took the same under advisement, and afterwards, on the 22d day of January, 1896, entered a decree dismissing the bill. From this decree the petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit of the United States. On appeal to said Circuit Court of Appeals for the Fourth Circuit, the decree of the Court below was reversed, and a decree of said Circuit Court of Appeals entered Nov. 6, 1897, directing that the order of the Interstate Commerce Commission be enforced. A petition for rehearing was filed, which was refused by the said Circuit Court of Appeals; but an order was entered withholding the mandate of the lower Court until the 20th day of January, 1898. On the 17th day of January, 1898, an appeal to the Supreme Court of the United States was allowed, said Louisville and Nashville Railroad Company and other defendants to the original proceeding, appellants in this Court, but appellees in the Circuit Court of Appeals, having filed with the Clerk of that Court their petition for

appeal, together with an assignment of errors and an appeal bond, which appeal bond was duly approved. In the order of the Circuit Court of Appeals granting said appeal, the following appears:

"It is ordered, adjudged, and decreed by the Court that said appeal be granted and allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States."

The condition of the obligation of the appeal bond concludes that they "shall prosecute said appeal to effect, and answer all damages and costs. If they fail to make said appeal good, then this obligation shall be void; otherwise the same shall remain in full force and virtue."

The appeal bond, the order, and assignments of error were filed Jan. 17, 1898.

The citation on appeal was issued the said 17th day of January, 1898; and the service of the same was acknowledged by the solicitor for Henry W. Behlmer, appellee and movant, on the 20th day of January, 1898.

Said appellee, Behlmer, now moves this Court "to vacate the supersedeas in the above cause, or for an order declaring that the appeal bond filed by the appellants in said cause does not operate as a supersedeas on the ground that Section 16 of the Act to regulate commerce forbids the security required on appeal to the Supreme Court to operate as a supersedeas in cases arising under that Act."

II.

SUPERSEDEAS.

"In England, until the year 1772, an appeal from a decree or order in chancery suspended all proceedings; but since that time a contrary rule has prevailed there. The subject was reviewed by the House of Lords in 1807, and an order was made establishing the right of the Chancellor to determine whether and how far an appeal should be suspensive of proceedings, subject to the order of the House on the same subject. See Palmer's Pract. H. L., 9, 10; 15 Vesey, 184; 3 Paige, 383, 385."

Hovey vs. McDonald, 109 U. S., 150, 160.

"A supersedeas, properly so-called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution has issued, it is a prohibition emanating from the court of appeal against the execution of the writ. It operates from the time of the completion of those acts which are requisite to call it into existence. If, before those acts are performed, an execution has been lawfully issued, a writ of supersedeas directed to the officer holding it will be necessary; but if the writ of execution has been not only lawfully issued, but actually executed, there is no remedy until the appellate proceedings are ended, when, if the judgment or decree be reversed, a writ of restitution will be awarded. To remedy the inconveniences that arose from an immediate issue of execution before the appellant proceedings could be perfected, the original Judiciary Act of 1789 provided, and the present Revised Statutes now provide, that no execution shall issue upon judgments in the courts of the United States, where a writ of error may be a supersedeas, until the expiration of ten days after the judgment. U. S. R. S., 1007. This regulation applies to proceedings in equity as well as to cases at law."

Hovey vs. McDonald, 109 U. S., p. 150, 159.

The United States Revised Statutes, Sections 1000 and 1007, provide when an appeal or writ of error shall operate as a supersedeas.

Section 1000 is as follows:

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

Section 1007 is as follows:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterwards, with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, execution shall not issue until the expiration of (the said term of sixty) (ten) days."

"A supersedeas upon the appeal of a suit in equity operates to stay the execution of the decree appealed from."

"A supersedeas is not obtained by virtue of any process issued by this Court, but it follows as a matter of law from a compliance by the appellant with the provisions of the Act of Congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given

him; but if the Court below is proceeding, through mistake or otherwise, to execute its judgment or decree, notwithstanding the supersedeas, we may, under Section 716, R. S., issue an appropriate writ to restrain that action; for it would be 'a writ necessary for the exercise of our jurisdiction.'"

Goddard vs. Ordway, 94 U. S., 672, 673.

The cases are uniform as to this.

The slaughterhouse cases, 10 Wall., 289, 291.
Kitchen vs. Randolph, 93 U. S., 88.

It is not contended that the appellants have not complied with the provisions of the statute under which they are, under ordinary circumstances, entitled to a supersedeas, nor that a supersedeas is not as effective as though a writ had, in fact, issued.

A supersedeas is not, strictly speaking, a *statutory* remedy. It operates as of right upon the execution of the appeal bond approved by the lower Court, the filing of the assignments of error, the order of the lower Court granting the appeal, and the service of the citation on appeal upon the appellee, all of which has been done in this case.

The provisions under the Judiciary Act of the United States, as set out in the Revised Statutes hereinabove quoted, are *statutory regulations* of a right which existed under the laws and orders of the Chancery Court in England upon the adoption of the Constitution and the formation of the Government of the United States of America.

III.

SECTION 16 OF THE ACT TO REGULATE COMMERCE.

The provisions of Section 16 of the Act establishing the Interstate Commerce Commission, germane to the motion under consideration, are as follows:

"When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said Court may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal shall not operate to stay or supersede the order of the Court or the execution of any writ or process thereon."

But said Section 16 provides that such appeal shall not operate as a stay or supersedeas of the order of the Circuit Court only under certain circumstances. Those circumstances are:

1.—That the common carrier shall violate or refuse or neglect to obey or perform any lawful order or requirement of the Commission.

2.—That a petition shall have been filed in the Circuit Court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be.

3.—That, on hearing, such Circuit Court of the United States shall determine that the common carrier has disobeyed the lawful order or requirement of the Commission, and issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission and enjoining obedience to the same.

4.—That the appeal shall be from a Circuit Court of the United States to the Supreme Court.

The Circuit Court of the United States for the District of South Carolina entered a decree dismissing the petition of the appellee, Behlmer, and decreed that the order of the Interstate Commerce Commission was unlawful. Consequently the said Behlmer has not brought his motion within the terms of Section 16 of said Act to regulate commerce.

This is an appeal from a Circuit Court of Appeals to the Supreme Court; consequently the said Behlmer has not brought his motion within the terms of Section 16 of said Act to regulate commerce.

The provision of said Section 16, holding that an appeal should not operate as a supersedeas under certain circumstances, is in derogation of the laws and practice of the Chancery Court of England at the time of the adoption of the Constitution and the formation of the Government of the United States of America and of the laws of the United States. Consequently it should be strictly construed.

IV.

THE ACT OF 1891 ESTABLISHING THE CIRCUIT COURT OF APPEALS.

A.

The appellee and movant, H. W. Behlmer, insists that the Act of 1891 establishing Circuit Courts of Appeals expressly adopts and provides that the provision in Section 16 of the Act to regulate commerce, forbidding an appeal from a Circuit Court of the United States to the Supreme Court of the United States from acting as a supersedeas of the decree of a Circuit Court of the United States, shall apply to an appeal from a Circuit Court

of Appeals to the Supreme Court of the United States. He bases this contention upon Section 11 of the Act of 1891 establishing Circuit Court of Appeals.

On the contrary, Section 11 has reference only to the consideration of appeals or writs of error, by which any order, judgment, or decree may be reviewed in the Circuit Court of Appeals, and provides that the provisions of the law now in force regulating the methods and systems of review through appeals or writs of error to the Supreme Court of the United States shall regulate the method and system of appeals to and writs of error from the Circuit Court of Appeals.

It is necessary to set out Section 11 of the Act establishing Circuit Courts of Appeals:

"That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Courts of Appeals under the provisions of this Act shall be taken or sued out, except within six months after the entry of the order, judgment, or decree sought to be reviewed; provided, however, that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the Circuit Courts of Appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the method and system of appeals and writs of error provided for in this Act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any Judge of the Circuit Courts of Appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

The object of the section is to declare as the law that no appeal or writ of error can be reviewed in the Circuit Court of Appeals, unless the same has been taken or sued out within six months after the entry of the order, judgment, or decree sought to be reviewed.

The proviso says that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the Circuit Courts of Appeals.

The proviso further declares that the law then in force regulating the methods and system of review through appeals or writs of error to the Supreme Court of the United States shall regulate the methods and system of appeals to, and writs of error from, the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error.

The proviso further gives to the judges of the Circuit Courts of Appeals the same discretion, power, and duty in regard to appeals to, and writs of error from, the Circuit Courts of Appeals, and the conditions of their allowance, that had theretofore been given to the justices or judges of the then existing courts of the United States.

Appellants therefore maintain that so far from the contention that the Act of 1891 prevents an appeal from the Circuit Court of Appeals to the Supreme Court of the United States from operating as a supersedeas of the decree of the Circuit Court of Appeals, it could only operate and prevent an appeal from a Circuit Court of the United States to a Circuit Court of Appeals from operating as a supersedeas in such cases as an appeal from a Circuit Court of the United States to the Supreme Court of the United States before the passage of the Act of 1891, would not operate as a supersedeas.

Before the passage of the Act of 1891 establishing the Circuit Courts of Appeals an appeal to the Supreme Court of the United States from a Circuit Court would have operated as a supersedeas, except where the Circuit Court of the United States had affirmed the decision of the Interstate Commerce Commission. In this case the Circuit Court of the United States dismissed the petition of the movant and appellee, H. W. Behlmer, who sought to enforce an order of the Interstate Commerce Commission. If such an appeal had been made directly to the Supreme Court of the United States, there would have been no necessity for a supersedeas, because the petitioner would have been the appellant. The movant and appellee appealed to the Circuit Court of Appeals from the decree of the Circuit Court refusing to enforce the order of the Interstate Commerce Commission. The Circuit Court of Appeals, of course, was not called upon to supersede the decree of the Circuit Court, there being no necessity for the same. The Circuit Court of Appeals acted in such case as the Supreme Court of the United States would have acted before the passage of the Act of 1891 establishing the Circuit Courts of Appeals.

There is no provision in the Act of 1891 establishing the Circuit Courts of Appeals that in case of an appeal from the Circuit Courts of Appeals to the Supreme Court of the United States, such appeal should not act as a supersedeas.

B.

The Act of 1891 establishing the Circuit Courts of Appeals repeals the provision in Section 16 of the Act to regulate commerce, providing that an appeal from a Circuit Court of the United States to the Supreme Court of the United States shall not operate as a supersedeas where the decree of a Circuit Court of the United States directs that an order of the Interstate Commerce Commission shall be complied with.

Section 5 of the Act creating the Circuit Courts of Appeals provides:

"That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases." . . . . . .

"In cases of conviction of a capital or otherwise infamous crime."

Yet in 163 U. S., p. 132, U. S. vs. Rider, it was held that the Judiciary Act of March 3, 1891 (the Act establishing Circuit Courts of Appeals), Chapter 517, 26 Statutes, 825, providing in Section 4 that "the review by appeal, by writ of error, or otherwise from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby established, according to the provisions of this Act, regulating the same," REPEALED SECTIONS 651 and 697 of the Revised Statutes of the United States.

Section 651 provides that whenever any question occurs on the trial or hearing of any criminal proceeding before a Circuit Court upon which the judges are divided in opinion, the point of division shall be certified under seal of the Court to the Supreme Court of the United States at their next session, and that imprisonment should not be allowed nor punishment inflicted in any case where the judges of such Court are divided in opinion upon the question touching the imprisonment or punishment.

Section 697 provides that where any question occurs on the hearing or trial of a criminal proceeding before a Circuit Court upon which the judges are divided in opinion, and the point upon which they disagree is certified to the Supreme Court according to law, said point shall be finally decided by the Supreme Court; and its decision and order in the premises shall be remitted to such Circuit Court, and there be entered of record, and shall have effect according to the nature of said judgment and order.

Notwithstanding the reservation of appeal was had to the Supreme Court of the United States in Section 5 of the Act establishing the Circuit Courts of Appeals, the Court held said Act did REPEAL Sections 651 and 697 of the Revised Statutes of the United States.

It was held in I. C. C. vs. A. T. & S. F. Railroad, 149 U. S., 264, that no appeal laid to the Supreme Court of the United States from decisions of the Circuit Courts upon the order of the Interstate Commerce Commission.

In United States vs. Rider, supra, the Court uses the following language:

"It is true that repeals by implication are not favored, but we cannot escape the conclusion that, tested by its scope, its obvious purpose, and its terms, the Act of March 3, 1891, covers the whole subject-matter under consideration, and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error, or certificate."

Wherefore it is respectfully submitted that the provision in Section 16 of the Act to Regulate Commerce, providing that appeals from a decree of a Circuit Court directing enforcement of a decree of the Interstate Commerce Commission shall not operate as a supersedeas, is repealed by the Act of 1891, establishing the Circuit Courts of Appeals; but, if such provision in Section 16 of the Act to Regulate Commerce has not been repealed by the Act of 1891 establishing the Circuit Courts of Appeals, that said provision in Section 16 of the Act to Regulate Commerce has no application to the motion under consideration:

First, because the Circuit Court refused to order the enforcement of the order of the Interstate Commerce Commission, and directed the dismissal of the petition of the complainant.

Second, because this is not an appeal from a Circuit Court of the United States to the Supreme Court.

Respectfully submitted,

ED. BAXTER,
Solicitor.